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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CONSUMERS POWER COMPANY,
Petitioner,

v.

NELSON AESCHLIMAN, SAGINAW VALLEY NUCLEAR STUDY GROUP, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at — F.2d —, and appears in the Appendix at pages 1-23. The decision of the Court of Appeals in *Natural Resources Defense Council* v. *Nuclear Regulatory Commission,* decided on the same day and in effect incorporated into the decision in the instant case, and the separate statements of Judges Bazelon and Tamm are reported at — F.2d —, and appear in the Appendix at pages 25-83.* The Initial Decision of the Atomic Safety

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* After the Appendix was prepared, the Court of Appeals (Order of Oct. 8, 1976) corrected its opinion to: (1) delete lines 3-5 on p. 58; (2) delete footnote 53; and (3) delete from footnote 59 "In this case the board members asked no questions whatsoever of Dr. Pittman. *See supra* note 53."

and Licensing Board of the (then) Atomic Energy Commission of December 14, 1972 appears in the Appendix at pages 114-152, and is reported at 5 AEC 261. The first decision of the Atomic Safety and Licensing Appeal Board on February 20, 1973, denying a motion for a new hearing, appears in the Appendix at pages 153-170, and is reported at 6 AEC 60. The second and third decisions of the Appeal Board relating to the merits of the case, on March 26 and May 18, 1973, appear in the Appendix at pages 171-183 and 184-251, respectively, and are reported at 6 AEC 182 and 6 AEC 331. The decision of the Commission on January 24, 1974, following the filing of the petition to review, appears in the Appendix at pages 257-278, and is reported at 7 AEC 19; the decisions of February 5, February 20 and April 11, 1974, appear in the Appendix at pages 279-280, 281-282 and 283-284, respectively, and are reported at 7 AEC 147, 149 and 311.

JURISDICTION

The opinion of the Court of Appeals, which constitutes its judgment, was entered on July 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did remand by the court below to the Nuclear Regulatory Commission of its orders granting petitioner licenses to construct a nuclear generating plant seriously misconstrue the relevant statutes in a way which threatens to frustrate the Nation's nuclear energy program, and constitute such an unwarranted instrusion by the court into the administrative process, as to call for review and reversal by this Court?

STATUTE AND REGULATIONS INVOLVED

The Appendix contains the relevant statutory provisions of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2011 *et seq.*), App. pp. 340-372, of the Energy Reorganization Act of 1974 (42 U.S.C. §§ 5801 *et seq.*), App. pp. 373-386 and of the National Environmental Policy Act (42 U.S.C. § 4332), App. 386-388.

STATEMENT

Two actions, Nos. 73-1776 and 73-1867 in the court below, were consolidated below and heard and decided together. Each seeks to review final orders of the Atomic Energy Commission—now the Nuclear Regulatory Commission—authorizing the issuance to petitioner, Consumers Power Company (Consumers) of permits to construct two nuclear reactors to generate electricity and process steam on a 1200-acre tract in Midland County, Michigan. The relevant facts may be summarized as follows:

Consumers' application for permits to construct the plant were filed with the Commission in January 1969, pursuant to Sections 103, 182, 185 and 189 of the Atomic Energy Act of 1954 (Act) (42 U.S.C. §§ 2133, 2232, 2235 and 2239). The proposed facility will generate some 1,300 megawatts of electricity for Consumers' integrated electric system in Michigan, and substantial amounts of process steam for an adjacent Dow Chemical Company complex. As required by Section 185 of the Act and the Commission's regulations (10 C.F.R. § 50.34), the application included a Preliminary Safety Analysis Report.

The application, including the four-volume Safety Analysis Report, was reviewed by both the Commission staff and the Advisory Committee on Reactor Safe-

guards, a body that is required to review each application and to make a publicly available report to the Commission concerning safety. See §§ 29 and 182(b) of the Act (42 U.S.C. §§ 2039, 2232(b)). The staff, after nearly two years of study and having received answers to its numerous requests for further information, issued a favorable Safety Evaluation on November 12, 1970 (R. 2605). The Advisory Committee had a few months earlier, on June 18, 1970, reached the same conclusion (R. 2616), and it reaffirmed its decision on September 23, 1970 (R. 2618).

On October 29, 1970, an Atomic Safety and Licensing Board was created pursuant to Section 191 of the Act (42 U.S.C. § 2241) to hold public hearings on whether the construction permits should be granted. Hearings on radiological health and safety matters began on June 21, 1971, and lasted for 17 days. The petitioners below, Aeschliman, *et al.*, and Saginaw Valley, *et al.* (referred to hereinafter as "intervenors") were granted permission to intervene. On the final day of these hearings, the decision in *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971) invalidated the Commission's then regulations under the National Environmental Policy Act (NEPA). Accordingly, the Commission revised its regulations (10 C.F.R. Part 50, App. D, now Part 51), and undertook a full environmental review of the proposed licensing action. A Draft Environmental Statement was issued in January 1972 and, after comments on it had been received from government agencies and the public, a Final Environmental Statement was issued in March 1972. The statement concluded that the construction permits should be issued, subject to Consumers taking certain

steps to protect the environment. During May and June 1972, 14 days of further hearings before the Licensing Board were held on environmental matters. On December 14, 1972 the Licensing Board, in a lengthy decision dealing with both the safety and the environmental issues, concluded that the construction permits should be issued, subject to certain conditions to protect the environment. App. pp. 114-152. That decision became immediately effective, notwithstanding possible further review (10 C.F.R. § 2.764), and construction has therefore been proceeding for more than three and a half years, at a cost to date exceeding $350,000,000.

Any party may take an appeal from the Initial Decision of the Licensing Board by filing exceptions with the Commission, which are then reviewed for the Commission by an Atomic Safety and Licensing Appeal Board. 10 C.F.R. §§ 2.762, 2.785. The intervenors duly filed exceptions and, upon review, the Appeal Board, in a series of decisions, essentially affirmed the decision of the Licensing Board, subject to certain conditions relating to quality assurance. The first opinion (App. pp. 153-170) rejected a motion by intervenor Saginaw for a new hearing on the ground of bias of the members of the Licensing Board. Its second opinion (App. pp. 171-183) related to issues of quality assurance and quality control. Its final opinion (App. pp. 184-251) dealt with all other aspects of the decision of the Licensing Board. The Commission did not review or amend the action of the Appeal Board embodied in these three decisions, and they became the final decision of the Commission. 10 C.F.R. §§ 2.760, 2.786.

Intervenors then filed petitions to review in the court below. While the cases were pending, intervenor Sagi-

naw filed a motion with the Commission to "clarify" the decision of the Appeal Board and to reopen the proceedings in the light of the Commission's then recent decision on the treatment of energy conservation issues in *Niagara Mohawk Power Corp.*, 6 A.E.C. 995. On January 24, 1974 the Commission issued, and there was filed with the court below, a Memorandum and Order dealing at length with that issue, and denying the motion to reopen the proceeding. App. pp. 257-278. On January 23, 1974 intervenor Saginaw filed another petition to reopen the proceedings to reassess the cost-benefit analysis because of increases in projected construction costs since the hearing. The Commission denied the petition (App. pp. 279-280) and likewise denied a subsequent supplement to the petition in the nature of a petition for rehearing. App. pp. 281-282.

The court below deferred its decision in this case until the issuance of its decision in *Natural Resources Defense Council* v. *NRC* (App. pp. 25-83), also decided on July 21, 1976. After having had the petitions for review under advisement for some 20 months, it remanded the proceeding to the Commission for further proceedings. While rejecting some of the intervenors' objections, the court sustained the argument by intervenor Saginaw that the Environmental Impact Statement was fatally defective for failure adequately to examine energy conservation as an alternative. Intervenor's comments on the draft Environmental Impact Statement, the court held, raised a "colorable alternative" of energy conservation which made it "incumbent on the Commission to undertake its own preliminary investigation of the proffered alternative sufficient to reach a rational judgment whether it is worthy

of detailed consideration" and to "explain the basis for each conclusion" (App. pp. 12-13), which, it concluded, the Commission had not done.

The court also sustained the argument of intervenor Saginaw that the report of the Advisory Committee on Reactor Safeguards (ACRS), which had reviewed the sophisticated engineering and safety problems involved in Consumers' application and made specific recommendations concerning some of them, was inadequate in that it stated, without specification, "Other problems relating to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports." That, the court held, did not comply with the statutory mandate that the Committee's reports be made public. App. pp. 16-21.

Finally, the court, incorporating by reference its contemporaneous decision in *Natural Resources Defense Council* v. *NRC* (App. pp. 25-83), in which it concluded that the Commission had been "capricious and arbitrary" in its consideration of waste disposal and reprocessing issues in its rule-making proceeding on that issue, directed the Commission to undertake "appropriate consideration" of such issues and to "restrike the cost-benefit analysis." App. p. 21.

Shortly after the decisions of the court were announced, the Commission issued a General Policy Statement (41 Fed. Reg. 34707, Aug. 16, 1976, App. pp. 313-321) indicating its response to the decisions. The Statement stated that, subject to further judicial review and notwithstanding "significant impacts on the availability and costs of nuclear power facilities" (App. p. 316), there would be a moratorium on the issuance of licenses for either construction or opera-

tion of nuclear power plants at least until a possible interim fuel cycle rule could be issued (App. p. 316). The Statement likewise announced that the hearings before the Commission in the two cases should be reopened to determine whether the licenses already issued (for construction, in the present case, and for operation, in the *NRDC* v. *NRC* case) should be suspended or modified (App. p. 319).

ARGUMENT

I

The Decision of the Court Below Is Such a Gross and Wholly Unwarranted Usurpation of the Authority and Responsibility of the Commission as To Warrant Review and Reversal by the Court

The Atomic Energy Act of 1954, and the procedures of the Nuclear Regulatory Commission which implement both that Act and the National Environmental Policy Act (NEPA), provide what must be the most elaborate, detailed and comprehensive administrative machinery for determining appropriate administrative action that has ever been devised. The Act establishes a deliberate policy encouraging the development and utilization of atomic energy for peaceful purposes, including the generation of electric energy. Sec. 3(d), 42 U.S.C. § 2013(d); S. Rep. No. 1699, 83d Cong., 2d Sess., p. 3 (1954); H.R. Rep. No. 2181, 83d Cong., 2d Sess., p. 3 (1954). At the same time, Congress recognized that generation of energy by way of nuclear reactors presents serious potential hazards as well as benefits, and that proposals that such reactors be built and operated should be subject to the most careful scrutiny and permitted only after the most searching and informed evaluation.

The recitation in the Statement, *supra,* of the application of these administrative safeguards to the Consumers project need not be detailed again. The Court will note, however, that even before the application was submitted to the Commission, the Act (Sec. 185, 42 U.S.C. § 2235) required that an elaborate safety analysis report be prepared—over 2200 pages in this case (R. 12, 261). As required by Commission regulation (10 C.F.R. §§ 2.101, 2.102), that report was reviewed by the Commission staff—dozens of specialists, consultants to the Commission, and persons in other departments of the government with expertise in many specialized areas—further information was sought from and supplied by Consumers, and numerous amendments to the Preliminary Safety Analysis Report were made (Staff Safety Evaluation, R. 2606 *et seq.*). In addition, as required by Sections 29 and 182b of the Act (42 U.S.C. §§ 2039, 2232(b)), the preliminary report was also reviewed and evaluated by the independent Advisory Committee of 15 consultants that had been established by Congress to advise the Commission on safety matters.

Public hearings then permitted further scrutiny of the work already done in evaluating the application. The Preliminary Safety Analysis Report, the Staff Safety Evaluation and the materials on which it relied, the Advisory Committee Report, and all documents in the Commission's Public Document Room and depositaries were available to any concerned party. In addition, Consumers supplied some 700 pages of answers to intervenor Saginaw's interrogatories (R. 5588-6408), and the staff and Dow also answered interrogatories (R. 4829, 6910). The health and safety hearings themselves lasted 17 days.

A similar detailed and exhaustive evaluation was made of environmental issues. In accordance with the Commission's NEPA regulations issued after the *Calvert Cliffs* decision, *supra*—regulations which the Second Circuit Court of Appeals has suggested were worthy of consideration by other agencies, *Greene County Planning Board* v. *FPC*, 455 F.2d 412, 422 (1972)—Consumers filed a 1600-page supplemental environmental report, with subsequent amendments responsive to staff inquiries (R. 12,612, 15,697, 16,044, 16,293). Then, as with the safety report, the staff conducted its own evaluation and filed its own Draft Environmental Statement for public comment (R. 16,152). After evaluation of numerous comments from various agencies and the public, the staff released its Fiual Environmental Statement (R. 17,355), together with all the comments it had received. Again, as with safety, the environmental conclusions of the staff were tested in public hearings, in this case over 14 days.

This was still not the end of the process. The Licensing Board, before which the hearings were conducted, was of course free to reach its own conclusions and, although hampered in this case by the failure of intervenors to define the contested issues (App. pp. 120-121)—intervenor Saginaw did not participate in the environmental hearings at all—dealt with every issue of fact on which intervenors introduced evidence or engaged in cross-examination, and with every legal issue which appeared to have been raised. On environmental issues, the Licensing Board recognized its responsibility to "independently consider the final balance among conflicting environmental factors in the record" (App. p. 135). Its opinion exercised that responsibility; it authorized the issuance of construc-

tion permits conditioned on certain changes in the plant and the imposition on Consumers of responsibility for certain environmental studies (App. pp. 114-152).

But even that was not the end. Every issue involved was again scrutinized by an Appeal Board on exceptions and briefs. Its review was not limited to the exceptions, however; the Appeal Board reviewed all the decisions of the Licensing Board "whether or not exceptions are filed" (App. p. 189). In this case, in three separate opinions, the Appeal Board considered, and affirmed, the Licensing Board decision. And finally, in this case, the Commission, in a long and careful opinion, dealt with the energy alternatives issue that intervenors had raised. App. pp. 257-278.

It is in the light of this background that the decision below must be evaluated. No one doubts, of course, that judicial review of an administrative decision so reached is not foreclosed. What should equally be beyond question is that an administrative decision so reached is to be set aside by the courts only for substantial procedural or substantive reasons. *Consolo* v. *Federal Maritime Comm.*, 383 U.S. 607, 620. Equally must it be clear that the basis for judicial intervention cannot be a disagreement by the reviewing court with the judgment of the administrative agency which it is authorized and required to make. " 'The court may not . . . ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters . . . .' " *Federal Power Comm.* v. *Florida Power & Light Co.*, 404 U.S. 453, 466. See also, *e.g.*, *Scenic Hudson Preservation Conf.* v. *Federal Power Comm.*, 453 F.2d 463, 468 (2d Cir. 1971).

The decision below does not accord with these precepts. The court below has reached out to question and to disagree with judgments which the Commission was empowered to make. The proper function of the administrative process has been thwarted.

Indeed, if the elaborate proceedings and careful treatment of the issues by the Commission in this case are inadequate, it is difficult to imagine a Commission proceeding—or any agency proceeding for that matter—in which the agency could protect its decision against a court prepared to usurp administrative responsibility and dissatisfied with the administrative result. In the present case, the proceedings have already consumed more than seven years. If the further proceedings contemplated by the decision below are required, with further judicial review of *those* proceedings, the matter would be virtually never-ending. It has already brought the nuclear power plant licensing authority of the Commission to a complete halt. Review, and reversal, by this Court is fully warranted.

II

The Error of the Lower Court's Approach, and the Need for Further Review, Is Confirmed by Examination of the Particular Reasons Relied On by That Court To Require Further Proceedings

As indicated in the Statement, *supra,* the court below found the Commission's action in this case wanting in three respects. Even the restricted statement of those three matters appropriate for a petition for certiorari will demonstrate the extent to which in each instance the court usurped the proper authority of the Commission to such a degree as to warant correction by this Court.

1. *The "fuel cycle" issue.* This issue involves the extent to which a nuclear plant's incremental effects in

producing radioactive wastes should be considered in evaluating the environmental effects of the plant. In the present case, the Licensing Board concluded that environmental questions relating to the fuel cycle issues should be confined to the aspects presented by transportation of fresh fuel to, and spent fuel from the Midland plant, transportation of packaged radioactive materials to low-level burying grounds, and environmental effects associated with handling of fuel at the site. R. 17,272. The Appeal Board affirmed. App. p. 241. See also *Vermont Yankee Nuclear Power Corp.,* 4 A.E.C. 930 (1972), App. pp. 85-102; *Long Island Lighting Co.,* 6 A.E.C. 53 (1973); *Potomac Electric Power Co.,* 8 A.E.C. 79, 85 (1974), App. pp. 285-301. At the same time, however, the Commission recognized the desirability of dealing with the further problem of waste storage and disposal by determining whether the environmental consequences of this part of the fuel cycle could and should be quantified and dealt with generically and the results then applied to individual reactors. A rulemaking proceeding was had (App. pp. 303-312), as a result of which the Commission found that the environmental effects of the fuel cycle on an individual reactor, though insignificant, could be quantified; numerical values were set out in a table (S-3). 39 Fed. Reg. 14188 (April 22, 1974). App. pp. 322-339. Because the Commission found those environmental effects to be essentially insignificant, it determined that there was no reason to reopen prior cases, including the present one. See App. pp. 331-332, 335.

The court below accepted the decision of the Commission that the fuel cycle issue was generic in nature and more appropriate for rule-making than for examination in each individual licensing proceeding. *Cf. Union of Concerned Scientists* v. *AEC,* 499 F.2d 1069 (D.C.

Cir. 1974); *Ecology Action* v. *AEC*, 492 F.2d 998, 1002 (2d Cir. 1974). However, because it found (in *NRDC* v. *NRC*) that the Commission's rule-making proceeding had been conducted in a "capricious and arbitrary" maner, it concluded that there was now no valid generic rule, and it apparently also rejected the Commission's conclusion that the environmental effect of a single nuclear power plant such as Midland was "insignificant." Consumers' construction permit, therefore, is put at the risk of suspension or modification pending further rule-making proceedings. App. p. 319. See ftn. 4, p. 23, *infra*.

The court's criticism of the Commission's rule-making is wholly unwarranted. It was preceded by a comprehensive staff paper—Environmental Survey of the Nuclear Fuel Cycle—which was available to all participants several weeks before the hearing, together with the background studies, handwritten notes and superseded drafts. On April 16, 1974 the Commission issued a Uranium Fuel Cycle Regulation (39 Fed. Reg. 14188) (now codified as 10 C.F.R. § 51.20(e)). Under that regulation a table summarizing and quantifying the environmental effects of the fuel cycle (Table S-3) is required to be included in environmental impact statements as a "cost" in the cost-benefit analysis. It is in the adoption of this regulation that the court below found that the Commission was "capricious and arbitrary" (App. p. 68). The sole basis for this conclusion was that the legislative-type hearing which the Commission held—*i.e.*, one in which intervenors were allowed full opportunity to present evidence but not allowed cross-examination or full formal pre-hearing discovery—did not adequately "ventilate" the issue. More specifically, the court concluded that the testimony of Dr. Frank Pittman, the Director of the Commission's

Division of Waste Management and Transportation, was an inadequate basis for the Commission's rule—that it had been accepted "uncritically." In part, this conclusion was based on the court's error in asserting that the hearing board did not question Dr. Pittman—an error which the court later acknowledged. See footnote, p. 1.

The decision represents a gross departure from accepted standards of judicial review. The Commission's rulemaking is governed by 5 U.S.C. § 553. *Siegel* v. *A.E.C.*, 400 F.2d 778, 785 (D.C. Cir. 1968). Contrary to the views of the court below (App. p. 40, n.23), that section does not require that discovery or cross-examination be accorded the participants. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742; *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224. Nor does the National Environmental Policy Act (42 U.S.C. § 4332), to which the court below referred and on which it appears to rely, impose requirements for rule-making which are more stringent. *United States* v. *SCRAP*, 412 U.S. 669, 694. Indeed, this Court at the last term made it clear that it is the responsibility of the agency to determine the procedure by which it satisfies the NEPA requirements. *Kleppe* v. *Sierra Club*, — U.S. —(June 28, 1976). The decision below would apear to be precisely to the contrary.

We submit that the opinion of the court (in the *NRDC* case, which it applied in this proceeding) is a classic example of judicial second-guessing and of usurpation of the administrative responsibility of the Commission, a responsibility intrinsic to "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *A.E.C.*, *supra*, at 783. That the fuel cycle issue is important no one doubts, including the Commission. That no one knows all the answers is

equally beyond argument. But that because of its importance and its difficulty a court can substitute its judgment for that of the expert body charged with responsibility on whether enough information is before it to enable it to proceed, is intolerable. It should not be sanctioned by this Court.

Moreover, the opinion below cannot be justified even if its criticism of the rule-making proceeding were valid. The Commission, faced with the fact that the proper evaluation of the environmental effects of waste disposal encompassed considerations far transcending the operation of a single nuclear reactor, was fully warranted in granting a construction license and remitting the waste disposal issue to rule-making. That the rule-making was not complete—or, were one to accept the criticism of the court below, was procedurally deficient and required further hearings—is no reason to bring to a halt on-going licensing proceedings. The comment of the court in *Union of Concerned Scientists* v. *AEC,* 499 F.2d 1069, 1081-1082 (D.C. Cir. 1974), is appropriate:

> "If the agency could not consolidate the challenges to its rules into rulemaking, and meanwhile proceed with adjudications, UCS and other intervenors in other cases would effectively be able to impose a moratorium on licensing, despite the Commission's judgment that it is prompt action that is called for."[1]

[1] In stating (in the NRDC v. NRC case) that "absent effective generic proceedings to consider these [fuel cycle] issues, they must be dealt with in individual licensing proceedings" (App. p. 36), it is possible that the court believed that even a valid regulation, because it was adopted subsequent to the licensing, would not have excused consideration of the environmental aspects of the entire fuel cycle in the licensing proceeding. If so, the court erred. See United States v. SCRAP, 412 U.S. 669; Union of Concerned Scientists v. AEC, *supra.*

2. *The "energy conservation" issue.* The question whether the power to be generated at the proposed nuclear plant is needed was extensively analyzed in Consumers' environmental report (R. 12,612, updated R. 15,697, 16,044, 16,293), broken down by customer classes and uses, and as to some large industries by individual customers. In reviewing these estimates, the staff of the Commission consulted with the agencies having regulatory authority over electrical utilities—the Federal Power Commission and the Michigan Public Service Commission—as well as with the Environmental Protection Agency, in preparing the Commission's Draft Environmental Statement. None of these agencies, or any other federal, state or local agency, disputed the need for the Midland plant. Clearly, therefore, in compliance with NEPA and the guidelines of the Council on Environmental Quality, the Commission consulted with agencies "with jurisdiction by law or special expertise with respect to" (42 U.S.C. § 4332) environmental impact.

After the Licensing Board and Appeal Board proceedings had been concluded and petitions for review had been filed, intervenor Saginaw, referring to a recent decision by the Commission in *Niagara Mohawk Power Corporation,* 6 A.E.C. 995 (Nov. 6, 1973), filed a motion to "clarify" the Appeal Board ruling on "energy conservation" matters. In response, the Commission issued its memorandum of January 24, 1974 (App. pp. 257-278). It is this response by the Commission which the court below finds "capricious and arbitrary."

On the contrary, the Commission dealt carefully and extensively with Saginaw's contentions. We commend it in full to the attention of the Court. Recog-

nizing "a deep national concern over energy sources and supply" (App. p. 264), it pointed out that "the phrase 'energy conservation' has a deceptively simple ring in this context" and, taken literally, "suggests a virtually limitless range of possible actions and developments" (*ibid.*). Under these circumstances, and recognizing that precise guidelines governing just what kinds of energy conservation issues should be open for consideration in individual licensing proceedings were neither possible nor desirable, it did state "certain basic considerations" (App. p. 265):

> "... Purported energy conservation issues must meet a threshold test—they must relate to some action, methods or developments that would, in their aggregate effect, curtail demand for electricity to a level at which the proposed facility would not be needed. As discussed hereafter, several of Saginaw's alleged 'energy conservation' issues have nothing to do with projected demand. Beyond that, the issue must pertain to an alternative that is 'reasonably available.' *Natural Resources Defense Council* v. *Morton,* 458 F.2d 827, 834 (C.A.D.C. 1972). Furthermore, the impact of proposed energy conservation alternatives on demand must be susceptible to a reasonable degree of proof. Largely speculative and remote possibilities need not be weighed against a convincing projection of demand. . . ."

The Commission then proceeded to weigh intervenor Saginaw's contentions against these basic considerations. It found that several of Saginaw's energy conservation contentions had been properly raised and had been considered (*e.g.,* promotional advertising, which was stopped). Others presented in Saginaw's motion it found had never been submitted to the Licensing Board. Others, such as Saginaw's contentions

as to the use of energy for "unnecessary and nonutilitarian products" (which Saginaw was invited to recast and failed to do), the Commission found had been properly given no further consideration. See App. pp. 267-278.[2]

The Commission's decision dealt carefully and in detail with this issue. It recognized the principle, on which the court below relies, that NEPA imposes on the Commission "an affirmative obligation to develop an adequate record upon which to assess the environmental impact of proposed nuclear plants" (App. p. 276). It also recognized, however, that workable rules for the Licensing Boards "must take into account that energy conservation is a novel and developing concept," and that at this stage the intervenors also had responsibilities—as to which Saginaw fell far short—to "state clear and reasonable specific energy conservation contentions in a timely fashion" and to come forward "with some affirmative showing if they wish to have these novel contentions explored further." App. p. 277. In other cases, even the court below appears to agree. See *State of North Carolina* v. *F.P.C.,* 533 F.2d 702, 707 (1976).

To characterize the Commission's careful resolution of this problem as "capricious and arbitrary" is simply to deprive these words of all meaning. The court below, making reference to extra-record materials produced since the administrative hearings, has simply

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[2] Intervenor Saginaw had also, for example, urged the Commission to investigate "the possibility of changing the present social stimuli to society which could result in decreased demand for electricity," and ways of generating electricity through means "not now known to man." Final Environmental Statement, App. E, Items 32, 33.

arrogated to itself the authority to resolve an issue—admittedly a difficult and novel one—contrary to the considered judgment of the agency which is authorized to deal with it.

Moreover, the court has added a gloss to the NEPA direction that an impact statement must consider alternatives (42 U.S.C. § 4332(c)(iii) that will mire NEPA in litigation concerning compliance with wholly formalistic procedures. The court has held (App. pp. 12-13) that an agency must make a preliminary investigation of any "colorable alternative" contained in an intervenor's comments on a draft environmental statement; "must reach a rational judgment whether it is worthy of detailed consideration in the [final] EIS . . .;" and must explicitly explain "the basis for each conclusion that further consideration of a suggested alternative is unwarranted." These requirements are imposed even though the record makes it clear that the agency has in fact taken the required "hard look" at environmental issues, including alternatives. *Kleppe* v. *Sierra Club,* — U.S. —, —, 96 S.Ct. 2718, 2731 (1976); *Natural Resources Defense Council Council* v. *Morton,* 457 F.2d 827, 838 (1972).

3. *The ACRS issue.* The Advisory Committee on Reactor Safeguards is a statutory group of independent, outside experts which is required by Section 182(b) of the Act (42 U.S.C. § 2232(b)) to review each application for a construction or operating license to determine whether, in the Committee's judgment, the proposed project can be constructed with a reasonable assurance of safety, and to make its report available to the public. It did so in this case, and its reports were made a part of the record (R. 2616, 2618). The court below, however, held that the report was inadequate and that the proceeding must be returned to the Commission for clarification of "ambiguities" in the Committee's report.

The basis for the court's conclusion is the language of the last two paragraphs of the Committee's report, which read as follows (App. pp. 17-18):

> "Other problems related to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports. The Committee believes that resolution of these items should apply equally to the Midland Plant Units 1 & 2.
>
> "The Committee believes that the above items can be resolved during construction and that, if due consideration is given to these items, the nuclear units proposed for the Midland Plant can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public."

Failure to specify or reference the "other problems," the court held, was fatally ambiguous.

This is virtually an issue contrived by the court below. The real complaint of the intervenors, which the court properly rejected, was that they were entitled to probe the "reasoning process" of the individual members of the Committee on *all* of the many safety issues with which the Committee dealt in its report, and hence that the Licensing Board erred in denying their 337 interrogatories, document demands, subpoenas and requests for depositions of the members of the Committee. The sweeping demands for discovery related only incidentally to the "other problems."

In fact, the record developed by the Commission and before the court on review included precisely the information which the decision portrays as lacking. In

a letter to then Commission Chairman Schlesinger, introduced by intervenor Saginaw itself, the Advisory Committee itemized the "other problems" and explained their "resolution." R. 24,389. Thus the court's remand "for clarification of the ambiguities noted" seeks to remedy a deficiency in the Midland record which never existed.[3]

But beyond that, the decision below on this issue represents an even more egregious intrusion into the administrative process than those already described. The Act requires that the Committee prepare a report and that it be made public. That was done. The report is not evidence, and neither the Licensing Board nor the Appeal Board relied on it as evidence. The former stated that the Committee's reports (there were two) "were admitted into the record . . . as required by law (42 U.S.C. § 2232(b)) for the sole purpose of showing compliance with the statute and not as evidence of the truth of any statement therein." App. p. 116, n. 2. The Appeal Board confirmed this statement. App. p. 207, n. 63. Judicial review of the substantive adequacy of such a collateral aspect of the Commission's proceedings is truly judicial review run riot.

Moreover, the criticism of the Committee's report is unwarranted. To assert, as the court does, that the statement "Other problems . . . cited in previous ACRS reports" inadequately met the statutory purposes of informing the public of possible hazards, is to assume that the public is too lazy, or too unconcerned, to be bothered to look at previous reports, all of which are,

[3] Not only were the "other issues" and their "resolution" described; the Appeal Board specifically found that they had all been considered and satisfactorily resolved insofar as they pertained to the Midland facility (App. pp. 230-231).

and were, of course, readily available in the Commission's Public Document Room. To have the proceeding remanded because the Committee had not, in the court's words, "provided a short explanation, understandable to a layman, of the additional matters of concern to the committee, and a cross-reference to the previous reports" (App. p. 20), is simply intolerable. The potential for litigation concerning whether the reports of an expert body operating in a complex area are "understandable to a layman" is obvious.

III

The Decision Below Raises Issues of Major National Importance

The significance of the decision below does not lie simply in its interruption and potential delay of the Midland project, serious as that may be in added ultimate costs and possible hardship to the customers and stockholders of Consumers. More importantly—much more importantly— it brought the entire nuclear power plant licensing program of the Nuclear Regulatory Commission to a crashing halt. The Commission's immediate reaction to the decision below was to announce (41 Fed. Reg. 34707; App. p. 316)—as it doubtless was required to do—that it would issue no more licenses for either construction or operation of nuclear power plants until it could attempt to satisfy the demands of the court below in this and the *NRDC* v. *NRC* cases.[4]

Nor should it be overlooked that while one of the issues below was the conduct of rule-making by the

[4] Indeed, since the Commission has felt it necessary to reopen the operating license proceeding of the Vermont Yankee Nuclear Power Corporation—the company involved in the NRDC v. NRC case—to determine whether its operating license should be suspended or revoked pending the Commission's attempt to satisfy

Nuclear Regulatory Commission, the decision will have impact on all agency rule-making under 5 U.S.C. § 553. The court's requirement that in proceedings under that section issues be "ventilated" and that there be "dialogue" creates a new, ill-defined and unworkable additional requirement which this Court should review and reject.

CONCLUSION

The petition for certiorari should be granted.

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the court below, the decision puts in jeopardy even existing nuclear power production. On October 8, 1976 the court below stayed its mandate in NRDC v. NRC on condition that the Commission make any licenses granted between July 21, 1976 and the time the mandate is issued, subject to the outcome of that case. The Commission is considering its future course in light of the court's order. In Public Service Co. of New Hampshire, Seabrook Station, Units 1 and 2, an order suspending the license for construction of a plant planned for operation in the early 1980's (ALAB 349, Sept. 30, 1976) is now being reviewed by the Commission.